

HAMPTON PLANNING BOARD MINUTES

August 15, 2007

PRESENT: Tracy Emerick, Chair
Robert Viviano, Vice-Chair
Fran McMahon, Clerk
Keith Lessard
Tom Higgins
Donna Mercer, Alternate
James Steffen, Town Planner

ABSENT: Tom Gillick
Jim Workman, Selectman Member

I. CALL TO ORDER BY THE CHAIRMAN

Chairman Emerick began the meeting at 7:00 PM by introducing the Board members and leading the Pledge of Allegiance to the flag.

II. CONTINUED PUBLIC HEARINGS

07-24 Tom Morgenstern
Waiver from Subdivision Regulations Section V.E (Detailed Plan)
2-unit Condominium Conversion
18-20 Cutler Avenue
Map 265 Lot 44

Mr. Tom Morgenstern representing himself with Mr. Joe Coronati his Engineer. New plans were passed out.

Before Mr. Morgenstern explained his project, several members of the Board had questions regarding the project.

The issue of the number of kitchens on the new plans was discussed and determined that there were three kitchens.

Mr. Emerick made mention that this application has been repeatedly continued.

Mr. Lessard asked which floor is the ground floor on the plan.

Mr. Morgenstern explained that the layout of the floors is that the lower level is the ground floor, the next level is the main floor and the last level is the second floor, then the roof.

Mr. Higgins asked about the number of kitchens in the building now as the previous plans showed the three kitchens. He stated that the application had been continued several times because of the number of kitchens shown on the previous plans that indicated three units. The board had requested new plans to showing two units only as he applied for a two-unit condominium conversion.

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Mr. Morgenstern asked the Board why it has an issue with the three kitchens where the zoning allows for four units on each lot.

Mr. Emerick stated it was because Mr. Morgenstern was before the Board for a two-unit conversion, not a three-unit conversion. As far as the issue of how many lots there are is not the concern of the Board. Mr. Morgenstern was told that he applied to the Board for two units or a three-unit conversion and not for two lots. The two lots and three units issues are not before the board.

Mr. Morgenstern gave an explanation of what he referred to as the in-law apartment in Unit 20; utilities are the same for all of the units.

BOARD

Mr. Lessard stated that the application is not clear. It appears to be a voluntary lot line merger, as shown as he has built across the lot line. The Duplex has two addresses and there is one lot, not two lots, therefore, he feels this is one lot.

Mr. Steffen stated that he might need to file a voluntary lot line merger application.

Mr. Emerick clarified what the board was reviewing with this application was a two-unit condominium conversion, not the number of lots. The board is seeing an application that shows three units and continuations were granted so the applicant could submit correct plans but the plans still show three units.

Mr. Morgenstern stated that the central issue the Board has is the about the third unit. He stated is not unprecedented to apply for a two-unit condominium conversion with an in-law unit. Mr. Morgenstern stated that there are listings of that nature on N Street and elsewhere in Hampton.

Mr. Lessard asked about the addresses, as they maybe illegal units.

Mr. Coronati stated that the Town Assessor shows it as one lot.

The Board asked Mr. Morgenstern if he receives two tax bills and Mr. Morgenstern stated that he receives one tax bill for two parcels and one building.

Mr. McMahon stated that Mr. Morgenstern has a Certificate of Occupancy for two units.

Mr. Viviano asked Mr. Morganstern what he was applying for. Mr. Morgenstern stated it was a two-condominium conversion.

Mr. Morgenstern again asked the question of why the board has an issue of the third unit.

Mr. Higgins again stated to Mr. Morgenstern that it was because he is applying for two units not three.

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Mr. McMahon stated to Mr. Morgenstern that because he withdrew without prejudice in 2001 before the ZBA he could go back to the ZBA to request the third unit.

Mr. Emerick stated that he read Mr. Morgenstern's letter and the minutes of the ZBA meeting. Mr. Emerick stated that because the ZBA did not have a 5-member board that evening Mr. Morgenstern asked to withdraw his request.

Mr. Morgenstern stated that was a condensed version and that the Board voted not to hear the case and asked me to withdraw the application. He explained that it was a legal remedy of the Board to choose not to hear a petition.

Mr. Emerick stated that the application was withdrawn from the ZBA and that non-action is not a defacto approval for three units, as stated by the owner Mr. Morgenstern. A withdrawal allowed by the ZBA meant that he was allowed to withdraw the application from the Board without prejudice.

Mr. Morgenstern explained that the ZBA requested the withdrawal and he complied, and his lawyer told him that leads to the defacto approval of the unit as a non-action and no one complained.

Mr. Higgins asked Mr. Morgenstern if he had that in writing and if this is in some way his intent to introduce the defacto approval issue for three units before this board.

Mr. Morgenstern explained his view of the zoning allowance for two lots in a RC district, and the ZBA withdrawal. He stated that Unit 18 was added in 1989, and then the neighborhood complained about the number of units. The Building Inspector in turn asked him to file with ZBA.

Mr. Lessard asked about the addresses, as they maybe illegal units.

Mr. Morgenstern asked if the board ever had a defacto approval issue before, and suggested that they should get a lawyer. Mr. Emerick stated no, this is not a Court, and according to the zoning regulations, he has an illegal third unit.

Discussion on the legal opinion ensued and it was suggested that Mr. Morganstern should receive legal counsel not the Board.

Mr. McMahon told Mr. Morgenstern that he could go back to the Zoning Board of Adjustment to get a decision on the issue of having three units before he applies for a condominium conversion before this Board.

Mr. Morgenstern asked of the Board why the issue of three units and of the continuations of this application is a problem for the Board. Again, Mr. Higgins told Mr. Morgenstern because he is applying for a two unit conversion not three unit one. The Board has requested that he prepare new plans, which show two units, and not three kitchens for his application of the two-unit condominium conversion. The continuations of the hearing were for that request and that he has repeated not complied.

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Mr. Morgenstern stated he knows that the Board is not a court but is a quasi-judicial board. Mr. Emerick told Mr. Morgenstern that the Board is not a Court, nor quasi-judicial board - it is a land use board, and if he wants three units he needs to re-apply to the ZBA and request the three units. The Planning Board does not grant decisions regarding zoning.

Mr. Morgenstern asked a secondary question; as the Board is uncomfortable dealing with this, would it be better if he withdraws.

Mr. Viviano inquired if the board gave him the option to withdraw.

Discussion on the issue of withdrawal ensued between the Board and Mr. Morgenstern.

Mr. Morgenstern stated that withdrawing makes it the defacto issue mute.

Mr. Morgenstern withdrew the application with out prejudice.

Mr. Emerick stated for the record that the withdrawal of the application does not give him "Defacto" approval.

07-46 Frank Sestito

Special Permit to Impact Wetlands Conservation District to install retaining wall and raise elevation of yard
11 Fieldstone Circle
Map 42 Lots 41-43

Mr. Christopher Boldt and Mr. Luke Hurley represented Mr. Sestito.

Mr. Boldt passed out new plans and documentation. The Board questioned whether this information should have been given to the Planning Office before the meeting.

Mr. Boldt explained that the materials were information that the Planning Office had provided to him on other applications that were similar to the case that were referenced by the Conservation Commission. This information is contained in his letter to the Board and noted for the record that the Conservation Commission is opposed to this application.

This is an "after the fact" approval request for a special permit for work that has been done. The project is not in wetlands; the retaining wall is 18"-24" and borders the wetlands. He stated that it is their position it is not in the wetlands but the buffer area. He stated as Mr. Hurley's report indicates it is a technical violation and there is negligible impact to the wetlands and buffer.

Mr. Boldt discussed what each exhibit was:

Exhibit A: A neighboring property on the corner of Fieldstone and Stowcroft, which is a subsequent approval by the Board in 2004 for two retaining walls. No reference about the second retaining the wall and rip rap in the stream.

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Exhibit B: An “after the fact” approval in 2005 of another similar case at 63 Barbour Road; addressed a non-compliance issue with a prior Special Permit. Fill, decking removed, planting is of unlimited nature, etc. Compromise was achieved.

Exhibit C: 7 Pearl Street – A special use permit relevant to the tidal wetlands.

Mr. Boldt stated that the wetlands that are involved in the project are a non-named stream, it is not a third or fourth order stream. He further stated that it is basically a man-made drainage-way created in the 1990’s for the subdivision.

Mr. Boldt went back to Exhibit C: This approval was an “after the fact” approval, which dealt with decking removal and plantings.

Mr. Boldt stated that these cases are not of a precedent value, and he was told that there are instances of denial, which have occurred, although no records can be found to substantiate that claim. He explained that on that basis a Court would not consider the claim.

Mr. Boldt then explained the application that is before the Board. The area of impact is 3500 square feet in the buffer area. He noted that they are asking for the wall and rip rap to be retained. They are asking that the remediation plan of Mr. Hurley, that is attached to his August 17th letter be accepted by the Board. He stated that if riprap is required to be removed they are amenable to that, however, the impact may be more detrimental to the wetland area. He asked if there was a middle ground – some compromise of mitigation. He noted that wildlife and plantings are abundant and the area is not being negatively impacted by the retaining wall and riprap.

Mr. Boldt then discussed the intentions of the ordinance [2.3.1] and outline how the project does not negatively impact the wetlands. He explained that the work has been there for 2 years and that the mitigation plan is adequate to allow for approval of the project. Mr. Boldt then asked for approval of the project.

BOARD

Mr. Emerick mentioned Section 2.3.7 of the ordinance regarding a restoration plan. Has it been submitted to the Conservation Commission?

Mr. Boldt stated No, and explained that it came before the Board first as this was the action that was requested. The Conservation Commission stated it would not approve the application, and they felt that by going through this process it would go back to the Conservation Commission to follow the right course of action.

Mr. Viviano asked if the applicant knew if he could not do this. Mr. Boldt stated that he did not, and no one informed him, not his contractor or the builder. He also noted that the thinking was it was okay based upon what was happening across the street.

Board members discussed this issue.

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Mr. Viviano asked what triggered this application after three years.

Mr. Boldt stated that a letter was sent to the Building Inspector about other issues and mentioned that work had been done, and if it had been approved.

Mr. Higgins asked if there were any pictures of the area, prior to the work that was done. He stated he could not believe that the homeowner would not have any. He stated he would also like to see the invoices concerning the amount of trees that were removed.

Mr. Lessard stated that he thinks this property was a resale and also noted that there would be invoices that would identify the work that was done.

Mr. Higgins asked how was it possible for the wall to follow the boundary of the wetlands and not know where the wetlands are. He stated that someone knew what they were doing when they were working in this area.

Mr. Boldt stated that the son-in law was the landscaper and that he works in Massachusetts.

Mr. Higgins stated that a contractor that does landscaping and does not know about wetlands is inconceivable. He also noted that 7 Pearl Street took a long time for a "final" satisfactory compromise. And there were instances of situations like this where it was not going well for them relative filling in of wetlands and they decide not to proceed with their applications.

Mr. Lessard mentioned in the 63 Barbour Road project the Board made it very clear to the developer in the beginning not to do the fill for a yard area. He noted all were told not to do what they eventually did. He stated his frustration with these after the fact approval request.

Mr. Boldt stated that he understood that.

Mr. Lessard stated that this project was running concurrently with Stowecroft project. He noted that this has been on going for three years and wondered why he did not ask his neighbor who went through this process about the procedure. He explained that the applicant had asked to do what they did, although they eventually did more than allowed.

Mr. Viviano explained that Stowecroft application was replacement of the walls and they requested permission to do the work; it was not built before hand.

Mr. Boldt asked the question of "rip rap is part of the disturbance".

Board members told him that was another case.

Mr. Lessard and Mr. Higgins stated that the riprap should be part of the disturbance.

Mr. Boldt stated he did not.

Mr. Lessard spoke about the amount of fill that was brought in and the 3500 square feet may not be accurate because they have to add soil to level the lot. He asked if there were pictures of what

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it looked like before hand. Mr. Lessard believes that using herbicides and fertilizers in this area is another violation as well.

Mr. Boldt stated that this is not a Shoreland Protection Act area and does not believe it is a violation. There was a general discussion of the Conservation Commission checklist stipulation being applied and whether it can be according to State law.

There as also a discussion of having soil borings conducted in the area that was disturbed.

Mr. Lessard stated that there is no character there and they are not honoring the land. He stated has is very frustrated – there is no excuse for this to happen.

Mr. Boldt stated he understands and that his client does not watch Ch. 22, does not read the local paper, as he is out of town a lot and does not get home until late at night. He reiterated that his client did not do this intentionally, although it is a violation.

Mr. Higgins asked how he followed the wetlands line exactly, if he did not know.

PUBLIC

Ellen Goethel, Chair of the Conservation Commission explained that the no-name stream is attached to the Line Swamp Watershed and that it is very important to the area and the wetlands. The debris reference is in the Conservation Commission's memo to the Board. She further stated that the Conservation Commission has not seen the mitigation plan and it sounds to her as if it is not enough. She stated that this is a slap in the face to all who do come before the Conservation Commission and Planning Board to do the right thing. She noted that there is evidence of destruction to the wetlands and the buffer and the natural habitat. She also noted the plans for the house was approved in 1991 and there were wetlands and the buffer area clearly delineated on the plan.

Peter Tilton, of the Conservation Commission noted the original ordinance stipulated a 10-foot buffer for the tidal areas (the beach) and 50 foot buffer for freshwater wetlands. When this property was developed, the ordinance clearly defined the 50-foot buffer around the stream as shown on the original subdivision plans. There was a known useable/buildable quantity on this lot when they bought the property. The subdivision plan was approved with these conditions of approval.

Jay Diener, of the Conservation Commission attempted to clarify two things. The work on Stowecroft was to do repair work not construction of a new wall, and Section 2.3.7 refers to a restoration plan, not a mitigation plan.

Sharon Raymond, of the Conservation Commission noted the Stowecroft project was the alteration of the resource area according to the ordinance. Fill is not the same, etc. She explained that just because one cannot see the wetlands does not diminish the value of the wetlands. She stated that all impact to the wetlands area denigrates the wetlands. She stated that the applicant should be held to the EPA permit of not allowing more degradation of Hampton

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watersheds. She- also stated that Massachusetts has broader regulations and this project would not be approved under the Massachusetts regulations.

Mr. Boldt responded that he respectfully disagrees about the fill. Ms. Goethel references the dumping waste behind the riprap. He stated that the area is the original condition and there has not been a piling of grass cuttings. His comment on Stowecroft project is that the record shows one wall to be built and there are two walls and rip rap now on the property, so whatever was approved is not what is on the ground.

Mr. Emerick asked for clarification of the issue. Does their bad behavior justify another's bad behavior? Precedent is one thing but bad behavior is something else. Mr. Boldt's comment goes to that they should have known better, when they saw the neighbor doing it. He explained that Mr. Sestito thought he did not have a problem, and what they want is a reasonable middle ground that recognizes and mitigates the situation. He noted that they hope it is acceptable in light of all the evidence and are asking for permission for "after the fact" approval.

BOARD

Mr. Higgins made the motion to continue to the October 17, 2007 meeting to allow the applicant two meetings to come up with a restoration/mitigation plan acceptable with the Conservation Commission. In addition, pictures shall be submitted to the Board, all the invoices for the tree cutting to determine how many trees were cut down, along with the original approval of the subdivision.

Mr. Lessard seconded it with the caveat of hiring an independent soils scientist to determine the original area of the wetlands and buffer zone through soil boring samples.

Ms. Mercer made the motion to honor the Conservation Commission and to require the applicant to tear down the wall and remove the riprap. She stated she is very sick of "after the fact approvals", as the Conservation Commission knows better than we do.

There was discussion by the Board regarding Ms. Mercer's motion and no second was made.

MOVED By Mr. Higgins

SECOND by Mr. Lessard

VOTE: -5-1-0 Ms. Mercer opposed **MOTION PASSED**

III. CONSIDERATION OF MINUTES

August 1, 2007

BOARD DISCUSSION

No discussion, motion to approve.

MOVED By Mr. McMahon

SECOND by Mr. Lessard

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VOTE: 5-0-0

MOTION PASSED

IV. CORRESPONDENCE

- Town Manager's letter dated 07/12/07. Mr. Steffen explained the Town Manager's letter, which asks the board to consider requiring the inclusion in applications submissions the creation, acquisition and preservation of open spaces of adequate proportions to be provided to the Town for passive and non-passive recreation, parks and conservation. The process would be to include such dedications in their subdivision proposals to the Board. Currently this requirement is not in the Subdivision Regulations.

Discussion: The Board will explore this issue research what other towns and cities are doing in this regard. It was decided to have a working session in October on this.

V. OTHER BUSINESS

- The Board appointment of the staff position "Conservation Coordinator" Steven Scaturro

Mr. Steffen gave a brief outline of the part-time position within the Planning Office to work with Conservation Commission and other land use boards on special permit administration and other conservation matters. Mr. Scaturro will be coordinating the reviews, and assisting with the recommendations and the follow up on the approved Special Permits.

BOARD DISCUSSION

Vote to appoint.

MOVED By Mr. Lessard

SECOND by Mr. Viviano

VOTE: 5-0-0

MOTION PASSED

- Staff request to change application deadlines.

BOARD DISCUSSION

Mr. Higgins and Mr. Viviano both stated that this should happen.

MOVED By Mr. Lessard

SECOND by Mr. McMahon

VOTE: 5-0-0

MOTION PASSED

- Nathaniel Court – Completion of Road

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BOARD DISCUSSION

Write a letter to the developer that the town will call the bond if the road is not paved by the end of October 2007. Direct the DPW to begin rubbish collection and recycling services.

MOVED By Mr. Lessard

SECOND by Mr. Viviano

VOTE: 5-0-0

MOTION PASSED

BOARD DISCUSSION

- Planning & Zoning Conference on October 13th, 2007 - Loon Mt/Lincoln, NH

VI. ADJORNMENT

MOVED By Mr. Viviano to adjourn.

SECOND by Ms. Mercer

VOTE: 5-0-0

MOTION PASSED

Meeting adjourned at 8:37PM.

Respectfully Submitted,
Kristina G. Ostman
Planning Coordinator